No. 86-1585

Supreme Court, U.S.
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MAR 30 1987
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DUNKIN' DONUTS OF PENNA., INC.,
Respondent

v.

MORRIS R. DAROFF, ELSIE DAROFF
and ALAN J. DAROFF,
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Michael J. Rutenberg, Esquire
230 S. 15th St., 2nd Floor
Philadelphia, Pennsylvania 19102
(215) 893-1111
Attorney for Petitioners

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

24 pp

QUESTION PRESENTED FOR REVIEW

Whether the Petitioners have been denied due process of law by the allowance into evidence in a civil proceeding of computerized business records summations under the Uniform Business Records as Evidence Act.

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OPINIONS BELOW

The opinion of the Pennsylvania Superior Court filed May 16, 1986 incorporates the opinion of the trial judge and is not officially reported. This opinion was affirmed by the Pennsylvania Supreme Court on December 30, 1986 by the denial of Petitioners' Petition for Allowance of Appeal. Copies of all the opinions appear in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on December 30, 1986. The petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and 28 U.S.C. §1201(c).

TEXT OF CONSTITUTIONAL PROVISION INVOLVED

Amendment 14, Section 1:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

This matter arises out of a Lease Agreement between the parties in which Respondent was the Lessee and the Petitioners were the Lessors. The lease property originally had a restaurant which was burned out. A dispute arose out of the provisions of the Lease pertaining to the responsibility to demolish the building, fill in the ground and compact same at 3,000 lbs. per square foot. At the trial of the cause, the trial judge directed a verdict in favor of the Respondent regarding the above stated provision of the Lease Agreement. In addition, and over the vehement objections of the Petitioners, he allowed evidence as to consequential damages to be presented. The Respondent claimed that due to the failure of the Petitioners to comply with the Lease Agreement, its franchisee was unable to take possession of the premises for several months resulting in a loss of franchise fees to the Respondent. The Respondent's witness, a representative having nothing to do with the bookkeeping or computer operations, was allowed to present a computerized summation of the sales reports of the Respondent's franchisee resulting in a finding for substantial additional damages against the Petitioners. The opinion of the trial judge sets forth the various objections posed by counsel for Petitioners to the introduction of this evidence (see Appendix).

The jury in this case entered a verdict of $88,000.00 against Petitioners, which verdict became a judgment upon denial by the trial judge of Petitioners' Post Trial

Motions. The judgment was appealed to the Pennsylvania Superior Court which affirmed the Order of the lower court. A Petition for Reargument was also denied. On December 30, 1986, the Supreme Court of Pennsylvania denied the Petitioners' Petition for Allowance of Appeal. The instant Petition for Writ of Certiorari has been filed from the action of the said Pennsylvania Supreme Court.

REASONS FOR GRANTING THE WRIT

The issue raised herein is whether the Respondent's witness could use a computerized printout for the purpose of establishing sales report figures from its franchisees. The lower court allowed this testimony on the basis of the Uniform Business Records as Evidence Act, Act of July 9, 1976, P.L. 586, No. 142, 42 Pa.C.S. §6108. At the present time this Uniform Act is in effect in about twenty-four states and comprehends numerous transactions both in interstate and intrastate commerce. The Act, however, was enacted when the means and methods of collecting business records were considerably different viz., before the computer revolution. The pertinent provision of the Pennsylvania Uniform Act has not changed in language since at least 1939. Indeed, there is sparse case history on the use of computerized records as evidence in Pennsylvania. The case often cited as the leading case is a lower court decision rendered in 1969, *Matthews Estate*, 47 D.&C.2d 529 (1969). With the widespread use of computers in business and industry, there is an urgent need to evaluate whether the rights of adverse litigants are being jeopardized by adherence to the old Uniform Act.

The courts in several states have reached varying decisions on this issue. In some instances, the courts have recognized the dangers of hearsay in the presentation of business records. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1190 (E.D.Pa.

1980). In general, they have attempted to fit issues concerning the new computer technology into the old mold of the Uniform Act. See 7 A.L.R. 4th 8 (1981 ed.).

In the instant case, the Petitioners objected inter alia to the use of a computerized printout based on the records of a third party, the franchisee, i.e. a case of double hearsay. While this was an evidentiary issue, the net result of the use of this unsubstantiated evidence was to deprive the Petitioners of their property without due process of law. It is respectfully urged that this Court grant the request of the Petitioners Petition in order to determine whether the rights of parties are being protected by applying the aforementioned Uniform Act to the circumstances of business records kept by today's computer technology.

Respectfully Submitted,

Michael J. Rutenberg
Attorney for Petitioners

Dated: March 30, 1987

APPENDIX

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

December 31, 1986

Michael J. Rutenberg, Esquire
230 S. 15th Street
Second Floor
Philadelphia, PA 19102

RE: Dunkin' Donuts of Pennsylvania, Inc. v.
Morris R. Daroff,
Elsie Daroff & Alan J. Daroff, Petitioners
No. 637 E.D. Allocatur Docket 1986

Dear Mr. Rutenberg:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"December 30, 1986.

Denied.

Per Curiam."

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/pj
cc: Robert G. Bauer, Esquire
Craig R. Trachtenberg, Esquire

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02357 Philadelphia 1985

DUNKIN DONUTS OF PENNSYLVANIA, INC.

v.

MORRIS R. DAROFF, ELSIE M. DAROFF and ALAN J. DAROFF,

Appellants

Appeal from Order entered August 8, 1985 in the Court of Common Pleas of Philadelphia County, Civil Division, at No. 1774 January, 1981.

BEFORE: BECK, POPOVICH and HOFFMAN, JJ.

MEMORANDUM:

By lease agreement dated April 30, 1980, appellee Dunkin Donuts leased premises at 5001 Rising Sun Avenue, Philadelphia, Pennsylvania, from appellants, the Daroffs, for a term of 20 years. The lease provided that appellants would demolish the existing structure so that appellee could erect a retail store which it would sublet to a franchisee. A conflict arose between the parties concerning a portion of the lease agreement dealing with the demolition of the existing premises and more particularly with the bearing capacity of the backfill. Appellee claimed damages in the amount of $132,675.66. A jury trial resulted in a verdict for appellee in the amount of $88,000. Appellants' filed a motion for a new trial and judgment N.O.V. which the trial court denied. Following entry of judgment, this timely appeal followed. We have reviewed the statements of error asserted by the appellant, the parties briefs and the record. We considered the extensive oral argument. Judge Marutani ably, clearly, and comprehensively addresses each of the issues raised by the appellant. He cites to the provisions of the lease

that are in question and he correctly resolves the meaning of those provisions. He relies on precedent which support his conclusion. We can add nothing to his excellent opinion and affirm on the basis of it.

Order affirmed.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
Civil Trial Division

January Term, 1981
No. 1774

DUNKIN DONUTS OF PENNSYLVANIA, INC.

v.

MORRIS R. DAROFF, ELSIE M. DAROFF and
ALAN J. DAROFF

MEMORANDUM OPINION
-with-
ORDER

MARUTANI, J.

Following a jury trial in which a verdict in the amount of $88,000 was returned in favor of plaintiff, Dunkin Donuts of Pennsylvania, Inc. ("Dunkin"), and against defendants — Morris R. Daroff, Elsie M. Daroff and Alan J. Daroff ("Daroffs") — defendants have filed motions for a new trial and judgment *non obstante veredicto*.

Background Summary

By lease agreement dated April 30, 1980, premises at 5001 Rising Sun Avenue, Philadelphia, Pennsylvania ("leased premises" or "the premises") were leased by Daroffs to Dunkin for a term of 20 years. After demolition by Daroffs of the existing structure on the leased premises, Dunkin was to erect thereon a retail store which, in turn, was to be sublet to a franchisee. Dunkin, among other things, was to collect a percentage of such franchisees' gross receipts from sales.

As to demolition of the existing structure on the leased premises, the lease agreement provided that Daroffs —

> shall be responsible for the cost of all demolition, compaction and leveling of premises to rough grade, as per City specifications. The Lessee [Dunkin] shall have the right to supervise the compaction at the premises. The demolition contractor would be required to backfill the premises with the bricks and stone from the demolished building plus other fill as required by the City. Minimum bearing capacity of 3,000 lbs. per sq ft. shall be confirmed by a registered engineer for all fill areas in the immediate area of the proposed building and under all proposed pavements.[1]

Although the lease was to commence on April 1, 1980 (the date of the lease), Dunkin's obligation to pay rent was to commence on the earlier of: (a) 60 days following Dunkin having obtained necessary permits and licenses for the intended use of the premises and delivery of possession to Dunkin free and clear of tenants or occupants, or (b) the first date that the proposed commercial store "is open to serve the general public."[2]

The lease agreement was drafted by Dunkin,[3] with Daroffs being represented and advised by a Milton Dresner, an individual with some 40 years of experience in real estate transactions[4] as a real estate broker,[5] who effected changes in the terms of the lease agreement on behalf of Daroffs.[6] Morris Daroff ("Daroff"), who acted on behalf of himself and the other defendants (wife and son), had himself been in the construction business

1. Exhibit P-1, Rider to Paragraph 2.
2. *Id.* paragraph 4.
3. Notes of Testimony ("N.T.") 40.
4. *Id.* 389, 426, 432.
5. *Id.* 389.
6. *Id.* 31, 439-40, 441.

since 1946 as a carpenter,[7] and by 1962 had established a company known as "Daroff Brothers, Inc." of which he was the president.[8]

Upon Daroffs contracting the demolition work to Charles Pompey ("Pompey"), a demolition contractor, demolition commenced sometime about the period of July 4, 1980.[9] Daroffs purported to have given notice of commencement of such demolition to Dunkin by calls to a "Leon Schwartz" and Eugene McCarthy ("McCarthy"), neither of whom was an employee of Dunkin.[10] McCarthy's testimony was that the only communication he received from Daroff was "[t]wo weeks, three weeks at the most" prior to September 18, 1980.[11]

Pompey, the demolition contractor hired by Daroffs, in response to Daroffs' counsel's questioning, testified as follows:

> Q. [By Mr. RUTENBERG] Now, even though you didn't use the word compaction as such, what were you doing with this loader? What kind of work was that?
>
> A. That loader, it's, well, it was hauling the dirt in, brickbat. I was leveling over and pushing it, kept going up and down it, rolling it to get it packed down where—
>
> Q. Would that not compact it as you were going along?

---

7. *Id.* 422.

8. *Id.* 420.

9. *Id.* 405-06. The "structure" to be demolished was the burned-out hulk of what had once housed the restaurant operation known to some as "Beck's on the Boulevard." N.T. 423.

10. Leon Schwartz was identified as a real estate broker whom Daroffs had retained to find a lessee for the premises: N.T. 404, 433. Mr. McCarthy, an architect, was an associate with Thalheimer and Weitz: N.T. 463, 405.

11. N.T. 467.

Mr. BAUER: [Dunkin's counsel] Objection. Leading question.

THE WITNESS: That will.

THE COURT: It is, but I'll allow it.

BY MR. RUTENBERG:

Q. Answer the question, sir.

A. It will compact the ground, but it wasn't my job to compact the job.

Q. You did it anyway?

A. It's not my job to compact the job. It's my job to level it off, but it will compact the ground.[12]

Daroff, while acknowledging that *it was Daroff's obligation to place the premises in condition so that Dunkin could build thereon the proposed store,*[13] and further acknowledging that the lease agreement called for 3,000 pounds bearing capacity, contended that compliance was not Daroffs' obligations.[14] This, notwithstanding that: (a) the lease agreement provided that the bearing capacity "shall be confirmed by a registered engineer for all fill areas."[15] and, (b) on July 18, 1980, Daroff was notified by Dunkin's representative that

12. N.T. 382-83.

13. *Id.* 438:

Q. —the deal was that you would put it [the premises] in a position so they could build the shop, and they would build the shop and run it and pay you rent, isn't that what the deal was?

A. [By DAROFF] Yes.

14. *Id.* 446, 448-49. Daroffs' counsel also asserted this position, arguing at some length that under the terms of the Rider to paragraph 2 of the lease agreement it was Dunkin's responsibility to comply with the specifications as to bearing capacity; *See* N.T. 473-80.

15. *See* footnote 1, supra, and the recital of the provision of the lease agreement in the body of this opinion.

Daroffs had "to have an engineer review the back filling that I would be looking for the certification of the fill materials, it must be compacted to the requirements written in the lease."[16] Daroffs' position remained "it wasn't my responsibility."[17] Thus, it was established that Daroffs did not secure a bearing capacity "confirm[ation] by a registered engineer for all fill areas" as provided by the lease agreement.

Accordingly, the trial court charged the jury that "as a matter of law" under the provisions of the lease agreement, "there was an obligation on the landowner, the Daroffs, to meet the requirement of the 3,000 pounds per square foot" bearing capacity.[18]

Before attempting construction, Dunkin retained a soils engineer, Robert Carlin ("Carlin"), who proceeded to have five "test pits" (borings) made into the fill, down a distance of eight or nine feet.[19] In the excavation he found "building debris, a combination of sand, silt, gravel, bricks, glass, steel, wood, wire, rags, what have you. . . ."[20] Carlin, an expert in his field opined that the bearing capacity of this fill was "zero" with no acceptable bearing value" or "no bearing capacity."[21] Dunkin notified Daroff of the results of the test boring,[22] but upon Daroff having failed to respond or to offer to resolve the problem, Dunkin then proceeded to bid the job for correction of the situation, having been advised by soils engineer Carlin as to the "cheapest" method to correct the problem.[23]

---

16. N.T. 88, Robert L. O'Nell, construction manager of Dunkin.
17. *Id.* 410.
18. *Id.* 490.
19. *Id.* 233 and 240.
20. *Id.* 225.
21. *Id.* 230, 235 and 238.
22. *Id.* 173-74.
23. *Id.* 232.

Expenses and *losses claimed by Dunkin* and as to which it presented evidence in this trial were:

(a) Test borings, removal and replacement of existing fill ..... $51,935.00[24]

(b) Loss in income for seven months. $73,490.66[25]

(c) Rental payments for five months. $ 5,750.00[26]

(d) Real estate taxes..... $ 1,500.00[27]

Hence, the total of expenses and losses claimed by Dunkin — being the four amounts listed hereinabove — was $132,675.66. The jury returned a verdict in favor of Dunkin for $88,000.00.

POST-TRIAL CONTENTIONS

Daroffs' post-trial contentions are essentially two-fold: first, the trial judge "erred in granting plaintiff's motion for a directed verdict," and second, the

24. *Id.* 108-109, 111, 112. Carlin's bill for effecting and examining the test borings, plus supervising the subsequent filing was $3,235.; the contracting work for removing the fill placed by Pompey (Daroffs' demolition contractor) and placing proper fill was bid at $42,900; there was $5,800 for a change order when the contractor discovered a masonry basement wall which had been left standing and simply covered over by Daroffs' demolition contractor.

25. *Id.* 273-76. Actual sales for the first seven months totalled $341,817.00. Under its agreement with the franchise, Dunkin claimed 12% of sales, a franchise fee of 4½%, and advertising fee of 5% on retail sales, with resulting figures respectively of $41,018.04, $14,381.77 and $17,090.85 — for a total for these three items of $73,490.66.

Dunkin's district sales manager, C. Richard Read, explained that the delay of seven months was irretrievably lost because with a prime lease having a fixed term, "We can't have a franchise agreement for a longer period of time than we have a prime lease agreement": N.T. 267.

26. *Id.* 277.

27. *Id.* 278.

"determination of damages was excessive. . . ."[28] As to the latter contention, defendants contend that plaintiff had failed to mitigate damages: that plaintiff is "foreclosed by the lease agreement from a claim for consequential damages;"[29] and that the trial judge erred in "allow[ing] [C. Richard Read, district sales manager of Dunkin] to testify from a computer printout [of sales at the premises]."[30]

We shall address these contentions, seriatim.

DISCUSSION

1. The trial court's ruling construing the lease agreement.

Contending that there was ambiguity in the lease agreement as to whose obligation it was to meet the "3,000 lbs. per sq. ft." bearing-capacity requirement, Daroffs contend that it was error for the trial court not to have submitted this question to the jury. The trial court disagreed and instructed the jury that —

> I made a determination as a matter of law that there was not, that under the law, reading this document, there was an obligation on the landowner, the Daroffs, to meet the requirement of 3,000 pounds per square foot.[31]

Indeed, Daroff himself, at one point, acknowledged that the bearing-capacity provision was his obligation:

> Q. [By Mr. BAUER, Dunkin's counsel] . . . You had to put something in there [the opening in the

28. "Defendants' Brief Sur Motion for New Trial and for Judgment N.O.V." (hereafter "Defendants' Brief.")

29. *Id.* 11.

30. *Id.* In his testimony, Mr. Read's referred to a computer printout in determining actual sales, N.T. 269, a procedure used by Dunkin as long as he had been with Dunkin, which was eight years: N.T. 272.

31. *Id.* 490.

ground] that would provide a basis for them [Dunkin] building the shop?

A. [By Daroff] It says so, what I was supposed to do, in that paragraph on the rider.

Q. And it says 3,000 pounds bearing capacity, doesn't it sir?

A. It does say 3,000 pounds bearing capacity, but not to the lessor.[32]

Similarly, we, as the trial court, had no less difficulty in construing this plain language agreed upon by the parties. Had we (erroneously) submitted the question of interpretation to the jury, and by special interrogatory the jury had responded that Dunkin, rather than the Daroffs, had the legal obligation to meet the requirements for bearing capacity, we would have been bound to set such a finding aside and grant a new trial.

The evidence was uncontradicted, and incontrovertible, that Daroffs did not follow the provisions of the lease agreement relating to bearing capacity and certification of compliance thereof by a "registered engineer." Daroff had rejected, and had refused to assume, such obligation. As to such, there was no disputed question to be resolved as to whether Daroffs had complied with the terms of the parties' agreement.

The jury was instructed that it must determine whether the claims made by Dunkin were "reasonable" and "related to any breach or failure to perform on the part of . . . Daroffs;" further —

> Now, if you find that any claim or any protion of a claim is speculative or uncertain, if that's the final determination that you make, that is not enough. It must be by what I defined for you earlier as a preponderance of the evidence.[33]

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32. *Id.* 446 (emphasis added).
33. *Id.* 491-92, 439.

2. Daroffs' claim of "excessive" damage award.

Daroffs assert a three-pronged bases for challenging the jury's award: namely, asserted failure of plaintiff to mitigate damages; no provision in the lease agreement for consequential damages; and permitting the use of a computer printout. However, Daroffs' principal contention focuses upon this third basis. In their supporting memorandum, Daroffs contend, as to the use of the computer printout, that: (a) the printout covered a period different than for the period of the delay, i.e. "October, 1981 through April, 1982 to cover the period from August 22, 1980 to March 31, 1981;"[34] (b) such was not a "business record;" (c) such "violat[ed] . . . the best evidence rule;"[35] and (d) rather than use of such printout, Dunkin "should have presented testimony by the principal of the franchisee."[36]

(A) *Mitigation of damages and consequential damages.*

As to mitigation, the trial court charged the jury pursuant to discussions with counsel.[37] The court had also charged that the jury was to determine whether Dunkin's claims were "reasonable," as well as related to any breach.[38] As to consequential damages, Daroffs refer to paragraph 15(d) of the lease agreement, which reads:

> (d) If either party shall default in any of its obligations hereunder, the other party may at its option cure the default at the expense of the party in default.

---

34. Defendants' Brief, p.12.

35. *Id.* 13.

36. *Id.* 14. In their memorandum, Daroffs assert: "The main issue, however, is that Defendants have no means of corroborating the figures presented without the records."

37. N. T. 501-02.

38. *See* footnote 33, *supra*, and related text.

Based on this provision of the lease agreement, Daroffs contend that Dunkin's options to relief are foreclosed. However,

> It does not expressly refer to a limitation of remedies, nor is it entitled as such. We hold that the limitation of the afflicted party's right to seek full redress is of such serious consequence that, in order to be effective, it must be written in clear, direct and unmistakable language. *See* 17 Am.Jur.2d *Contracts* §455 (1964).

Loyal Christian Benefit Ass'n v. Bender, ____ Pa.Super. ____, ____, 493 A.2d 760, 763 (1985). Furthermore, Daroffs were given the opportunity to cure the default, but declined to do so.

> The injured party is not obligated to mitigate damages where both he and the liable party have an equal opportunity to reduce damages. *S. J. Groves & Sons Co. v. Warner Company*, 576 F.2d 524 (3d Cir. 1978).

Loyal Christian Benefit Ass'n V. Bender, supra, ____ Pa.Super. at ____, 493 A.2d at 763. Had Daroffs belatedly remedied the fill conditions, but a seven-month construction delay had nonetheless resulted because of the initial default, it could not be contended that under paragraph 15(d) that Dunkin would be foreclosed from seeking consequential damages for the delay. That it was Dunkin, instead of Daroffs, who corrected the defective fill, should not deprive Dunkin of remedies for consequential losses caused by the delay. Dunkin was entitled to those losses suffered which "were the natural and proximate result of" Daroffs' breach: *Taylor v. Kaufhold*, 368 Pa. 538, 545, 84 A.2d 347 (1957); *see* Restatement (Second) of Contracts §351(1) (1981).

(B) *Use of the computer printout sheets.*

The District Sales Manager for Dunkin testified extensively as to Dunkin's use of computer printouts, stating that such sheets had been in use for at least during the eight years he had been with Dunkin[39] and that they were created from weekly sales reports from franchisees,[40] from which reporting the franchisees are then charged and obligated to pay a total of 26½ percent thereof to Dunkin.[41] Under the incontroverted evidence, the trial court was "[of] the opinion [that] the source of information, method and time of preparation were such as to justify its admission:" Uniform Business Records as Evidence Act, Act of July 9, 1976, P.L. 586, No. 142 §2; 42 Pa.C.S. §6108. Inasmuch as the reporting franchisee would be assessed 26½ percent of reported sales, the indicia of reliability — being in the nature of "declaration against interest"[42] — of these business records was fortified.[43] More over, even if the franchisee had been

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39. N.T. 272.

40. *Id.* 270.

41. *See* footnote 25, *supra*, and related text.

42. N.T. 273. Daroff' counsel asserted various grounds for objecting to the computer printout sheets, including one founded upon hearsay, to which the trial court responded:

> THE COURT: It may be, but I think it's an exception to the hearsay rule, under declaration against interest, because the more he [the franchisee] reports, the more he gets taxed. On that basis I would overrule the objection.

Setting aside the Uniform Business Records as Evidence Act, we acknowledge that the basis of "declaration against interest," standing alone, may not have sufficed because it had not been established that the franchisee was unavailable. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F.Supp. 1190 (E.D.Pa. 1980). However, compare Freedman v. Mutual Life Insurance Co., 342 Pa. 404, 21 A.2d 81 (1941), cited at page 14 of the text of this opinion.

43. *See* Matthews Estate, 47 D.&C.2d 529, 117 P.L.J. 223 (1969), wherein the court received into evidence computer printouts under the authority of the Uniform Business Records as Evidence Act.

placed on the witness stand, it was most unlikely that he would be possessed of independent recollection of his weekly sales over the seven-month period when the business first opened in April of 1982 — more than two and one-half years prior to the trial of this cause.

> [D]ocuments may be admitted in proof of facts to which the writer of the document could be called to testify, where the circumstances indicate that his recollection would be less reliable than the notation would be less reliable than the notations made by him at the time the events occurred. "The assertion may be such," [Dean Wigmore] stated, "that we cannot expect, again or at this time, to get *evidence of the same value* from the same or other sources."

Freedman v. Mutual Life Insuramce Co., 342 Pa. 404, 415, 21 A.2d 81, 87 (1941) (emphasis in original).

The franchisee, an occupant of Daroffs' property, was available to Daroffs, as were any documents that Daroffs might have desired by way of discovery. *See Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 291, n. 5, 285 A.2d 451, 457, n. 5 (1971).

Wherefore, there is entered the following —

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
Civil Trial Division

January Term, 1981
No. 1774

DUNKIN DONUTS OF PENNSYLVANIA, INC.

v.

MORRIS R. DAROFF, ELSIE M. DAROFF and
ALAN J. DAROFF,

Appellants

O R D E R

AND NOW, August 8, 1985, upon consideration of (a) "Defendants' Brief Sur Motion for New Trial and for Judgment N.O.V." filed by defendants — Morris R. Daroff, Elsie M. Daroff and Alan J. Daroff; (b) the response thereto by Plaintiff, Dunkin Donuts of Pennsylvania, Inc.; (c) hearing had thereon; and (d) the evidence and the applicable law, it is HEREBY ADJUDGED AND ORDERED that said *defendants' motion for new trial and judgment n.o.v. are denied* and *judgment is entered on the jury's verdict in favor of Dunkin Donuts* of Pennsylvania, Inc. and against Morris R. Daroff, Elsie M. Daroff and Alan J. Daroff, in the sum of *$88,000.00*, with interest.

BY THE COURT:

MARUTANI, J.